

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES A. MIX,

Plaintiff/Counter-Defendant-
Appellant,

v

RHONDA JEAN MIX,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

March 2, 2004

No. 250888

Lapeer Circuit Court

LC No. 02-031337-DM

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals a number of issues arising from a judgment of divorce. We affirm the decisions of the trial court for the reason set forth in this opinion.

Plaintiff and defendant were married on July 11, 1993. Defendant had a daughter from a previous relationship. At the time of the divorce, the parties had two daughters, ages ten and five. Plaintiff filed his complaint for divorce on April 30, 2002. At the time of trial, plaintiff was fifty-three and defendant was thirty-seven. The parties had been married for nine years. Plaintiff testified at trial that he made close to \$60,000 in 2000; however, testimony was also presented that plaintiff earned \$88,000 in 2001, \$131,350 in 1999, \$114,000 in 1998, and \$92,000 in 1997. He stated that his income had been higher in the past but that overtime was no longer available and that he had taken a voluntary layoff.

Defendant did not work outside the home during the marriage. Her last employment was at Kentucky Fried Chicken, making \$7 an hour. She stated that she had only completed the tenth grade and expected to earn approximately \$280 a week once she found a job.

Plaintiff claimed that because of defendant's alleged serious drinking problem, he had to assume more responsibility with the children. He also alleged that defendant's drinking resulted in their house being set on fire. He testified that one night after drinking, defendant went into the baby's room, lit some candles, and set the house on fire. He also testified that in March 2002, defendant was convicted for driving under the influence of alcohol. Defendant admitted that she had been counseled for substance abuse and mental health problems and that she was a

recovering alcoholic. Defendant stated that she had started seeing a counselor in November 2000.

Defendant testified that the plaintiff was violent during the marriage and testified regarding numerous instances of alleged misconduct by plaintiff during the marriage. Defendant testified that on September 29, 2002, defendant started beating her boyfriend in the head with a stick. She also stated that in the summer of 2002, plaintiff called her names in front of the children and wrestled a tape recorder away from her. Following a bench trial, the trial court awarded sole physical custody to defendant.

Plaintiff first claims that the trial court erred when it granted sole physical custody of the parties' two daughters to defendant. This Court reviews for clear legal error the trial court's choice, interpretation, or application of the existing law. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). Findings of fact are reviewed under the great weight of the evidence standard. *Id.* This Court will sustain the trial court's findings of fact unless "the evidence clearly preponderates in the opposite direction." *Id.* Discretionary rulings, such as a trial court's determination on the issue of custody, are reviewed for an abuse of discretion. *Id.*

Custody disputes are to be resolved in the child's best interest, as measured by the factors set forth in MCL 722.23. The trial court found that factors (a), (d), (e), (g), and (h) weighed equally with respect to both parties. The court also found that factors (b), (j) and (k) weighed in favor of defendant with factors (c) and (f) weighing in favor of plaintiff. Plaintiff argues that the trial court erred in determining factors (b), (d), (e), (g), (j) and (k).

MCL 722.23(b) examines "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." The trial court concluded that this factor favored defendant because she had been the primary caregiver for the children during the marriage while plaintiff worked long hours at his job. After reviewing the trial court's findings, we cannot say that they are against the great weight of the evidence. In factors MCL 722.23(d), (e) and (g), we concur with the trial court that neither party prevailed in consideration of those factors. In matters of this nature, we defer to the trial court's ability to witness the testimony and defer to its findings of fact, absent a finding that those facts are against the great weight of the evidence.

MCL 722.23(j) examines "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." The trial court determined that plaintiff had a history of making degrading and demeaning comments toward defendant in the presence of the children. The evidence tended to show that defendant encouraged the children's relationship with plaintiff while he attempted to do the opposite. The trial court's conclusion that defendant should prevail on this factor was not against the great weight of the evidence.

Plaintiff challenges the trial court's finding that defendant prevailed with respect to factor (k). MCL 722.23(k) examines "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." Defendant argues the trial court erred when it considered as domestic violence an altercation he had with defendant's boyfriend. However, although the trial court mentioned the altercation, it also noted other instances of violence present in the household. We sustain the trial court's findings.

The trial court properly found that factors (b), (j), and (k) favored defendant while factors (c) and (f) favored plaintiff. In addition, the trial court noted that factor (j), which weighed against plaintiff, was a significant factor in this case. Therefore, the trial court did not abuse its discretion in deciding that it was in the children's best interest to grant physical custody to defendant.

Plaintiff next challenges the trial court's order that he pay of \$1,215 a month in child support. A trial court's factual findings are reviewed for clear error. A finding is clearly erroneous if, after reviewing all the evidence, this Court is left with a definite and firm conviction that a mistake has been made. *Thames v Thames*, 191 Mich App 299, 301-302; 477 NW2d 496 (1991). An award of child support rests in the sound discretion of the trial court, and that exercise of discretion is presumed correct. *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1992).

Plaintiff argues that the trial court erred by imputing his income at \$1,450 a week, instead of \$1,150 a week. However, "when a party voluntarily reduces or eliminates income, and the trial court concludes that the party has the ability to earn an income and pay child support, the court does not err in entering a support order based upon the unexercised ability to earn." *Olson v Olson*, 189 Mich App 620, 621-622; 473 NW2d 772 (1991). Testimony was presented that plaintiff earned \$88,000 in 2001, \$131,350 in 1999, \$114,000 in 1998, and \$92,000 in 1997. Because plaintiff took voluntary layoffs and decreased his salary to \$60,000 in 2002, the trial court's findings regarding plaintiff's income are not clearly erroneous.

Plaintiff also argues that the trial court erred by imputing defendant's income at \$220 a week. However, testimony showed that the most defendant had ever earned in a year was \$4,000 and that she had only completed the tenth grade. Therefore, the trial court's findings that she could only earn minimum wage are supported by the evidence and are not clearly erroneous.

Plaintiff next challenges the trial court's award of alimony. This Court reviews the trial court's factual findings regarding an award of alimony for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). The findings are presumptively correct, and the burden is on the appellant to show clear error. A finding is clearly erroneous if this Court "is left with a definite and firm conviction that a mistake had been made." *Id.* at 654-655. "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 655. The trial court's decision regarding alimony must be affirmed unless this Court is firmly convinced that it was inequitable. *Sparks, supra* at 152.

The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Moore, supra* at 654. The trial court should consider the following relevant factors: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the parties' ability to work, (4) the source and amount of property awarded to the parties, (5) the age of the parties, (6) the parties' ability to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. *Olson v Olson*, 256 Mich App 619, 631; 674 NW2d 64 (2003).

The trial court noted the length of the marriage, health of the parties, age of the parties, needs of the parties, conduct of the parties, and ability to pay spousal support in its opinion. The award of spousal support was not inequitable, and we therefore affirm the award pursuant to the mandates of *Sparks, supra*.

Affirmed.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski